Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1429

C. W. ANTILL,
Petitioner,

vs.

MAX JOE SIGMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

MICHAEL J. GANNAM
P. O. Box 10085
Savannah, Georgia 31402
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8030

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C. W. ANTILL,
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MAX JOE SIGMAN,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered in the above entitled case on January 18, 1970. ~~1970~~ 82.

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the Supreme Court of Georgia, printed in Appendix A to this petition, *infra*, pp. A1-A3, is reported in ..... Ga. ....., ... SE2d ..... (1978).

The judgment of the Superior Court of Chatham County, Georgia is printed in Appendix A, *infra*, pp. A4-A8.

JURISDICTION

The judgment of the Supreme Court of Georgia was dated and entered on January 6, 1978. The judgment of the Supreme Court of Georgia denying a rehearing in the case on Petitioner's motion, was dated and entered on January 18, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257 (3).

QUESTIONS PRESENTED

(1) Did the Georgia Supreme Court err when it upheld the validity of the Restrictive Covenants in question notwithstanding the Amendment to the Declaration of Protective Covenants executed by a majority of the affected property owners which sought to declare the Restrictive Covenants void and of no effect?

(2) To what extent may the right of private property owners to the peaceable use and possession of their property be infringed upon by the State?

CONSTITUTIONAL PROVISIONS

The constitutional provisions which Petitioner contends have been violated by the judgment of the Supreme Court of Georgia are the following from Amendment XIV to the Constitution, to-wit:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This equitable action was initiated by Respondent in order to enforce certain restrictive covenants, or equitable servitudes, regulating the use and enjoyment of lots in Petitioner's neighborhood. More specifically, Respondent sought a Mandatory Injunction commanding Petitioner to remove a chain link fence separating Petitioner's property from that of Respondent.

Petitioner is the owner of a residence located at 12 Stillwood Court, Chatham County, Georgia, and known on the subdivision plat for the area as lot number 128, Berkshire Woods-West Four. Respondent is the owner of the adjoining residence located at 11 Stillwood Court, Chatham County, Georgia, and known on the aforesaid subdivision plat as lot number 129, Berkshire Woods-West Four.

The above described lots were sold by the subdivision developer, the common grantor, subject to certain protective covenants which seek to restrict the type of use and enjoyment to which the owners of the affected lots may subject their property. The lots affected by these covenants are lots numbers 119-134.

The developer, by affidavit, has stated that it was the intention and purpose of said protective covenants to restrict the use of the lots of said subdivision through his implementation therein of a type of housing construction imported from California and commonly known as

the "Zero Lot Line Concept." The concept as implemented by the common grantor in this particular instance requires a back wall to be built about midway from the rear property line. This is repeated throughout the neighborhood, thus leaving the rearmost portions of these lots unwalled. These open areas beyond the property owner's rear wall remain the fee simple property of the landowner, albeit subject to certain restrictive covenants. The purposes of these covenants are to insure that these areas beyond the walls remain uncluttered and in their natural state.

The portions of the restrictive covenants at issue in this case are as follows:

(16) "As to the area behind the walls on lots 119-134 and the area shown as easement outside and South on lots 126 and 127 shall remain as wooded area, and the property owner shall remove undergrowth, but shall remove no trees except where dead. This area shall not be fenced or cross-fenced, and no playground equipment or other temporary or permanent improvement permitted." [From Declaration of Protective Covenants dated February 13, 1967]

(19) ENFORCEMENT. "Enforcement shall be by proceedings at law or in equity against any person or persons attempting to violate any covenant either to restrain violation or to recover damages." [From Declaration of Protective Covenants dated February 13, 1967]

(3) PROPERTY BEYOND EXTERIOR PERIMETER WALL.

"The present owner and subsequent owners of the lots to which this instrument applies, acknowledge that a large portion of each lot is located outside of the common exterior perimeter wall and with respect to that portion of that property lying to the rear of each residence, these

portions of this property shall be maintained in their natural state and the owner of each is hereby charged with the responsibility for such maintenance, and each owner shall be required to keep that portion of his property clear of heavy underbrush; however, no trees shall be removed therefrom unless they are in a dying condition and without first obtaining permission for removal from the Architectural Committee of Powell Homes, Inc. If a request for tree removal is made to this committee and no reply thereto is given within a ten day period from the date of submission of such request, then such request shall be deemed to be approved. There will be nothing placed, installed or stored upon that portion of such properties lying outside of the common exterior perimeter wall. That is to say, there will be no installation of swimming or wading pools, fences, clothes poles, playground sets, barbecue grills, treehouses, utility buildings, hedges and/or equipment or accessories of any kind. There shall be no automobiles, trailers, campers, boats and/or vehicles of any kind parked thereon, either permanently or temporarily, and there shall be no activities of any kind conducted thereon." [Common Wall Agreement and Supplemental Protective Covenants dated April 24, 1969]

Notwithstanding the existence of the above mentioned covenants and their proper recordation, two property owners whose property is directly affected by these covenants planted vegetable gardens on their portions of the open areas, and all but two property owners, Respondent included among the two, undertook the erection of chain link fences running the length of their property lines between adjacent lots.

In addition, concurrent with the prosecution of this action a majority of the homeowners of this subdivision, specifically 12 out of 16 homeowners, executed and re-

corded an amendment seeking to nullify the restrictive covenants pertaining to the use and enjoyment of the areas found outside of the common exterior perimeter wall. (Exhibit A of "Countermotion for Summary Judgment on Behalf of Defendant" dated August 6, 1976.)

Prior to the filing of the original action, Petitioner had been plagued by the continuous trespass of Respondent onto and across Petitioner's property. Respondent was in the habit of crossing Petitioner's property in order to use the resulting shortcut to visit a friend's house. Petitioner's objections to this practice went unheeded, whereupon Petitioner warned Respondent of his intention to prevent his trespass by erection of a fence across the common open area. Respondent subsequently informed Petitioner that he would seek to enjoin the construction of said proposed fence, which Petitioner went ahead and erected. Respondent then sought a temporary and permanent injunction to enforce the removal of the fence.

Respondent's petition, filed in the Superior Court of Chatham County in Civil Action Number 11483C on April 27th, 1976, showed that the common grantor subdivision developer had placed the negative easements in question on the homes in the neighborhood and that Petitioner had acquired his home burdened with the Protective Covenants. Respondent further showed Petitioner's violation of the Covenants by the erection of the fence and asked the Court for a temporary and permanent injunction.

Petitioner's Answer recited the fact that all of the owners of the homes in Berkshire Woods-West Four Subdivision, except the Plaintiff, had constructed fences across the so-called open space at the rear of their property and, in so doing, said property owners have effectively amended the Declaration of Restrictive Covenants previously applicable to these properties. Petitioner's claim

is that the purpose of the covenants at issue, and of the Zero Lot Line Concept, was to provide for the preservation of open and uncluttered areas maintained in a fairly natural state. A general trend towards the erection of fences in violation of the covenants violates the principle and concept which the restrictions were intended to secure. Therefore, the covenants have been rendered moot and useless and Petitioner should not be forced to subject the peaceable use and enjoyment of his property to covenants which no longer serve their intended purpose.

Respondent, on June 2, 1976 filed a Motion for Summary Judgment based on the aforesaid Restrictive Covenants. Petitioner, on August 6, 1976, filed a cross Motion for Summary Judgment on the ground that the subsequent amendment to the Protective Covenants dated July 16, 1976 and signed by a majority of the property owners in the subdivision in question eliminated the anti-fence restriction in the original covenants and rendered the action moot. In an order signed by the Honorable Frank S. Cheatham, Jr. dated June 17, 1977, the Superior Court of Chatham County, Georgia granted Respondent's Motion for Summary Judgment and denied Petitioner's Motion for Summary Judgment.

Petitioner then appealed to the Supreme Court of Georgia. On January 6, 1978 the Supreme Court of Georgia affirmed the decision and judgment of the trial court. In an order dated January 18, 1978, the Supreme Court of Georgia refused Petitioner's request for a rehearing of the case.

A Federal Question Was Made in and Passed Upon by the Supreme Court of Georgia

The Appeal to the Supre .e Court of Georgia raised a Federal question. That Court passed upon the Federal question by affirming the judgment of the trial court.

The appeal filed with the Supreme Court of Georgia, in the Brief of Petitioner as well as in the oral argument of Petitioner, raised a Federal question; namely, to what extent may the right of a property owner to the peaceable and quiet enjoyment and use of his property be infringed upon by the State notwithstanding the provision of §1, Amendment XIV to the United States Constitution guaranteeing to each person the freedom to hold and use his property free from unwarranted interference by the States.

The constitutional questions were properly and timely raised and were considered, passed upon and rejected by the Supreme Court of Georgia.

REASONS FOR GRANTING THE WRIT

In accord with the decisions of this Court in *Winters* v. *People of State of New York*, 333 U.S. 507 (1948) and *Miller* v. *Schoene*, 276 U.S. 272 (1928) wherein this Court determined the existence of jurisdiction on appeal after the highest State Court had finally determined that the State statute in question did not violate the 14th Amendment, Petitioner respectfully presents his Petition for Writ of Certiorari to this Court and prays that it may be granted.

The Supreme Court of Georgia, in its decision to uphold the validity of the Restrictive Covenants complained of, has in effect decided a question of far-reaching constitutional significance concerning the relationship of the individual citizen with the government of his state. By its decision the Supreme Court of Georgia has decided a Federal question of substance not heretofore determined by this Court. By the court's action, Petitioner has been

denied the full use and enjoyment of his property. The court's adherence to a rule of law, though well established, has in this situation had the effect of denying to Petitioner the full rights of property to which he is entitled as a citizen of these United States. Petitioner purchased this property; Petitioner maintains this property; Petitioner pays taxes on this property; yet, Petitioner may only fully utilize a portion of the entire fee to which he is entitled. Fences abound in the neighborhood; Petitioner's case is no isolated example. The "Zero Lot Line Concept" has not succeeded in one of its primary purposes. Still, Petitioner is expected to refrain from the full use of his property.

This Court has held that a person may question the constitutionality of a statute or governmental action the effect of which is to deny to him a right that otherwise he would have. Restrictive covenants which seek to limit the free use and alienability of real property have traditionally been looked upon by the courts with disfavor and any doubts as to interpretation are usually resolved in favor of the free use of the property, *Huntington Palisades Property Owners Corporation* v. *Metropolitan Finance Company of California*, 180 F.2d 132 (9 Cir. 1950). This Court has held that property rights under the Constitution are fundamental rights, *West Va. State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1942) and it has been held that property rights predate the Constitution, *Grubel* v. *MacLaughlin*, 286 F.Supp. 24 (1950). Of course, such rights are not absolute where the public good demands, *Breard* v. *City of Alexandria*, 341 U.S. 622 (1968); yet, in the instant case no public good is served by subjecting Petitioner to the force and effect of the covenants in question. Such restrictions should only be upheld when the restriction retains some value to those benefited by it, *Case* v. *Morrisette*, 475 F.2d 1300 (1973).

This Court has recognized that a "taking" of property within the meaning of the Constitution may assume many forms. In *U. S.* v. *Causby*, 328 U.S. 256 (1946), the frequent and regular overflights of airplanes above Respondent's property was found to constitute a taking prohibited by the Constitution. In the instant case Petitioner's property is subject to interference of an even more direct nature, regardless of the fact that a majority of the neighborhood property owners have indicated their desire to eliminate the building scheme subject to which they purchased their property.

In conclusion, Petitioner does not argue for the elimination of Restrictive Covenants altogether; on the contrary, Petitioner recognizes and acknowledges their value for certain purposes. It is Petitioner's contention, however, that when the covenants no longer serve the purpose for which they were intended and where the majority of the property owners affected thereby indicate their disfavor with the restriction, that said restriction should be removed from the property burdened thereby.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to the Supreme Court of Georgia.

Respectfully submitted,

MICHAEL J. GANNAM
P. O. Box 10085
Savannah, Georgia 31402
Attorney for Petitioner

APPENDIX A

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In the Supreme Court of Georgia.

Decided: Jan. 06. 1978

32922. ANTILL v. SIGMAN

NICHOLS, Chief Justice.

The appellant and appellee are adjoining property owners in a residential subdivision. The developer-common grantor placed certain protective covenants on the property restricting the use thereof. Each home was surrounded by a walled enclosure and that part of each owner's property to the rear and outside the walled enclosure was to be maintained in a natural state. Paragraph 16 of the protective covenants provided in part: "This area shall not be fenced or cross-fenced, and no playground equipment or other temporary or permanent improvement permitted."

Paragraph 18 provided: "*Term.* These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five (25) years from the date these covenants are recorded . . ." This instrument was recorded on February 13, 1967 and amended on April 24, 1969. These instruments are referred to in each owner's deed.

Although Code Ann. § 29-301 (Ga. L. 1935, p. 112; 1962, p. 540; 1971, p. 814) provides that restrictive covenants shall not run for more than 20 years in areas in counties which have adopted zoning laws, it does not invalidate the covenants but limits it to the statutory period.

McKinnon v. *Neugent*, 225 Ga. 215 (1) (167 SE2d 593) (1969).

The appellant fenced in the area to his rear covered by these covenants and began a garden on it. The appellee filed suit for injunction as provided in Paragraph 19 of the restrictive covenants to enforce the agreement. The appellant attempted to amend the fencing restriction by having a majority of the property owners execute an amendment to the declaration of protective covenants.

The trial court found that under the terms of Paragraph 18 the restrictive covenants could not be amended during the original 25-year period except by agreement of 100 percent of the property owners and therefore, the attempted amendment by only a majority of the owners was of no force and effect. The trial court then granted appellee's motion for summary judgment and issued an injunction against the maintenance of the fence, and appellant enumerates this as error.

The appellant argues three reasons why the court erred in its grant of summary judgment and injunction.

1. First, it is contended that the protective covenants unduly restrict the property owner's right to peaceful use and enjoyment of their property.

"When a grantee accepts a deed, he will be bound by the covenants contained therein, although the deed has not been signed by him." Code Ann. § 29-102 (Ga. L. 1967, pp. 592, 593), and in *Wardlaw* v. *Southern Railway Company*, 199 Ga. 97 (2) (33 SE2d 304) (1945), this court held: "In such a case, the general scheme binds all the purchases inter sese, not only as to the restrictions embodies in their respective deeds, but also as to such inhibitions as were embraced within the general scheme of the subdivision, of which they had or were chargeable with

notice." See *Kilby* v. *Sautell*, 203 Ga. 256 (46 SE2d 117) (1948). There is no merit in this argument.

2. Secondly, it is argued that due to the changed conditions in the neighborhood, the original purposes have been rendered moot. The only act alleged or shown to have been done is the violation of the no fencing restriction by a few of the property owners. This does not show such a general change in the neighborhood as to render the covenant void. *Dooly* v. *Savannah Bank &c Co.*, 199 Ga. 353 (3) (34 SE2d 522) (1945). See also *M.M.G. Development Co.* v. *Houston*, 229 Ga. 163 (190 SE2d 39) (1972).

3. Thirdly, it is contended that the appellee is estopped from enforcing the protective covenant. The appellant contends that when a party entitled to the benefits of the covenant leads the other party to believe he has acquiesced in the violation he is thereafter estopped to demand strict compliance with the covenant.

The petition was filed on April 27 and appellant alleged in his affidavit that the fence was completed on April 13. The installation of a fence can be done in one day, and a lapse of two weeks between the installation and the filing of the petition would not, as a matter of law, bar appellee; but this question is addressed to the sound discretion of the trial court.

Judgment affirmed. All the Justices concur.

IN THE SUPERIOR COURT OF CHATHAM
COUNTY, GEORGIA

CIVIL ACTION NO. 11483

MAX JOE SIGMAN

vs.

C. W. ANTILL

ORDER

Both plaintiff and defendant filed Motions for Summary Judgment. Plaintiff's motion seeks injunctive relief against the maintenance of a fence by defendant on defendant's property which plaintiff contends is a violation of protective covenants dated February 13, 1967 as amended April 24, 1969.

Defendant seeks to dismiss plaintiff's civil action on the ground that a subsequent amendment to the protective covenants dated July 16, 1976 and signed by a majority of the property owners in the Subdivision in question eliminates the anti-fence restriction in the original restrictive covenants and renders the action moot.

This case is governed by the restrictive covenants hereinbefore mentioned. Plaintiff owns Lot 128, Berkshire Woods, West, 4 Subdivision in Chatham County, Georgia. Defendant owns adjoining Lot 129 in that Subdivision.

The portions of the restrictive covenants at issue in this case are as follows:

> "16. As to the area behind the walls on Lots 119-134 and the area shown as Easement outside and south on Lots 126 and 127 shall remain as wooded area, and the property owner shall remove undergrowth, but shall remove no trees except where dead.

> This area shall not be fenced or cross-fenced, and no playground equipment or other temporary or permanent improvement permitted." [From declaration of Protective Covenants dated February 13, 1967]
>
> "18. *Term.* These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five (25) years from the date these covenants are recorded, after which said covenants shall be automatically extended for successive periods of ten (10) years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part." [From declaration of Protective Covenant dated February 13, 1967]
>
> "19. *Enforcement Period.* Enforcement shall be by proceedings at law or in equity against any person or persons attempting to violate any covenant either to restrain violation or to recover damages." [From declaration of Protective Covenant dated February 13, 1967]
>
> "3. *Property Beyond Exterior Perimeter Wall.* The present owner and subsequent owners of the lots to which this instrument applies, acknowledge that a large portion of each lot is located outside of the common exterior perimeter wall and with respect to that portion of that property lying to the rear of each residence, these portions of this property shall be maintained in their natural state and the owner of each is hereby charged with the responsibility for such maintenance, and each owner shall be required to keep that portion of his property clear of heavy underbrush; however, no trees shall be removed therefrom unless they are in a dying condition and without

first obtaining permission for removal from the Architectural Committee of Powell Homes, Inc. If a request for tree removal is made to this Committee and no reply thereto is given within a ten day period from the date of submission of such request, then such request shall be deemed to be approved. There will be nothing placed, installed, or stored upon that portion of such properties lying outside of the common exterior perimeter wall. That is to say, there will be no installation of swimming or wading pools, fences, clothes poles, playground sets, barbecue grills, tree-houses, utility buildings, hedges and/or equipment or accessories of any kind. There shall be no automobiles, trailers, campers, boats, and/or vehicles of any kind parked thereon, either permanently or temporarily, and there shall be no activities of any kind conducted thereon." [Common Wall Agreement and Supplemental Protective Covenants dated April 24, 1969]

Paragraph 4 of the Common Wall Agreement of April 24, 1969 is identical with paragraph 18 of the Covenants of February 13, 1967, and paragraph 5 of the Common Wall Agreement of April 24, 1969 is identical to paragraph 19 of the original protective covenants of February 13, 1967.

> "Now, therefore, in consideration of the premises and the mutual benefits to be derived by the respective property owners and any subsequent owners of the lots in said subdivision, the said undersigned owners in compliance with the provisions of Paragraph 18 of Declaration of Protective Covenants, and Paragraph 4 of the Common Wall Agreement and Supplemental Protective Covenants, hereby delete the prohibition against fences across the rear of their lots, that being the property described in the Common Wall Agreement and Supplemental Protective Covenants as 'property beyond exterior perimeter wall'." [Amendment to Declaration of Protective Covenants Berkshire Woods—West 4, dated July 16, 1976, signed by a number of property owners.]

Plaintiff and other property owners in the Subdivision did not sign the alleged amendment of July 16, 1976.

It is this Court's opinion that the original Protective Covenants of February 13, 1967 as amended on April 24, 1969 are valid and binding on the owners of all property within the subdivision in question; that those restrictive covenants prohibit the erection of fences, including the fence of defendant Antill, which is the subject of the legal action now before this Court.

It is further the opinion of this Court that the aforestated restrictive covenants run with the land and bind the land for a period of twenty-five (25) years from April 24, 1969 and that they cannot be amended except by agreement of 100% of the members of the Subdivision. The provision of the Protective Covenants allowing a majority of the owners of lots to change the Covenants clearly applies only to an extension of the Covenants after the first twenty-five-year period has elapsed and not to the original twenty-five-year term of the Covenants.

THEREFORE, the attempted amendment of the Restrictive Covenants of July 16, 1976 is a nullity and of no force and effect.

In his affidavit defendant, Clarence W. Antill, states that the fence was erected for the purpose of preventing a continuous trespass across the rear of his property over an easement that was reserved solely for the use of utility companies. The question of the right of the defendant to prevent others from trespassing on his property by

using the utility easement is not before this Court, but it can be stated that a utility easement does not give the general public the right to use the same. It can only be used by those utilities authorized by the easement, and the owner of the property has the right to prohibit other persons, including neighbors, from using the utility easement, but under the restrictive covenants he does not have the right to erect a fence to accomplish this purpose.

IT IS, THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED that plaintiff's Motion for Summary Judgment be and the same is hereby granted, and defendant is hereby enjoined from allowing the fence in question to be continued in place thirty (30) days after this order.

ORDERED FURTHER that defendant's Motion for Summary Judgement be and the same is hereby denied.

In Open Court this 17 day of June, 1977.

/s/ Frank S. Cheatham, Jr.
Judge Superior Court,
E. J. C., Georgia

cc- Mr. Michael J. Gannam

cc- Mr. H. G. Okhuysen